TAN SRI ABDULLAH AHMAD & ORS

v.

DATO' DR MAHMOOD MERICAN & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-975-2001]
8 NOVEMBER 2002

CIVIL PROCEDURE: *Parties - Joinder of parties - Party ordered to be added as co-defendant in High Court - Application for leave to intervene and be added as the ninth respondent before Court of Appeal - Whether misconceived*

When the appeal came before this court, a preliminary view was formed that the High Court judge had misdirected himself on important legal issues. A re-trial was ordered before another judge and certain directions were issued. This involved, *inter alia,* Bank Bumiputra Malaysia Bhd ('BMBB') being added as a co-defendant ('the said order'). This was BMBB's application to be given leave to intervene and be added as the ninth respondent, and to set aside the said order.

Held:
Per Gopal Sri Ram JCA

[1] When this court directs a party to be added to a proceeding before the High Court, that joinder takes place not before this court but the High Court. The proposed intervener, *ie,* BMBB, was never directed to be added as a party to this appeal. Thus, the application ought to have been forwarded before the judge who would be assigned to the re-trial. (p 794 e-g)

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Bila rayuan ini dihadapkan ke mahkamah ini, suatu pendapat permulaan terwujud dimana didapati bahawa hakim Mahkamah Tinggi berkenaan telah tersalah-arah dirinya atas isu undang-undang penting. Satu perbicaraan semula diarahkan dihadapan hakim lain dan beberapa perintah dikeluarkan. Ini termasuk, antara lain, Bank Bumiputra Malaysia Bhd ('BMBB') dicantum sebagai defendan kedua ('perintah tersebut). Ini adalah permohonan BMBB untuk kebenaran mencelah dan dicantum sebagai responden ke-sembilan, dan untuk mengepikan perintah tersebut.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Bila mahkamah ini memerintahkan sesuatu pihak untuk dicantumkan dihadapan Mahkamah Tinggi, percantuman tersebut berlaku bukan dihadapan mahkamah ini tetapi di Mahkamah Tinggi. Oleh itu, permohonan tersebut sepatutnya dihadapkan kepada hakim yang ditugaskan kepada perbicaraan semula tersebut.

Rayuan ditolak dengan kos.]

For the appellants - PS Ranjan (MS Dhillon); M/s PS Ranjan & Co
For the 1st - 7th respondents - R Shyamala; M/s Hussein & Co
For the 8th respondents - Hj Sulaiman Abdullah (Anita Sockalingam); M/s Zain & Co
For the intended intervener - Ramid Khan (PW Ng); M/s Tay & Partners

[Appeal from High Court, Kuala Lumpur; Suit No: D1-22-2101-90]

Reported by M Maheswaran

JUDGMENT
(Oral)

Gopal Sri Ram JCA delivering judgment of the court:
This is the judgment of the court.

The appeal herein came before us on 28 January 2002. After hearing arguments, we formed the preliminary view; and we emphasize that this was merely a preliminary view; that the learned trial judge had seriously misdirected himself on important issues of law. We therefore conveyed our first impression to counsel that this might be an appropriate case to order a retrial of the action. Counsel then quite properly sought an adjournment to obtain instructions from their clients. The appeal was therefore posted for mention on 4 March 2002 on which date counsel appeared before us and informed that they had agreed to a re-trial of the action. So, with the consent of both sides, we directed that the action be re-tried before another judge, as is the usual practice. To overcome any procedural difficulties that the parties might face on returning to the High Court, we issued certain directions as to the future conduct of the principal suits out of which this appeal arose. These are the directions we gave as reflected in the order:

(i) that the bank, formerly known as Bank Bumiputra Malaysia Berhad, be added as a co-defendant.

(ii) appellants are not required to raise a case against the said co-defendant.

(iii) that the appellants be given liberty to amend this statement of claim and counterclaim and all other pleadings within three weeks from the date of this order

(iv) that the 1st to 7th respondents be at liberty to amend their pleadings within 3 weeks from the service of the amended statement of claim.

On Monday of this week (26 August 2002), we were moved by Bumiputra-Commerce Bank Berhad for *inter alia*, the following orders:

(i) that the former Bank Bumiputra Malaysia Berhad be given leave to intervene and be added as the 9th respondent in the instant Civil Appeal No. W-02-975-2001 and that the title of the same be amended accordingly; and

(ii) that the Order of the Court Of Appeal dated 4 March 2002 be set aside in so far as the said order adds the former Bank Bumiputra Malaysia Berhad as a co-defendant to Kuala Lumpur High Court Suit No. D1-22-2101-90 as consolidated with Kuala Lumpur High Court Suit No. D3-22-1178-92.

Now, we must be forgiven if we thought, at least at first blush, that the motion was quite out of place. For, it is elementary law that when this court directs a party to be added to a proceeding before the High Court, that joinder takes place not before this court but the High Court. It ought to have been plainly obvious to those advising the proposed intervener, the bank, that the application ought to be made to the judge before whom the action had been assigned for re-trial. At the risk of repetition, to emphasize the point, the proposed intervener in this motion before us was never added or directed to be added as a party to this appeal. The relevant direction was to add the proposed intervener as a co-defendant in the proceedings below: that is to say, the consolidated actions now pending re-trial.

But we must say at once, in all fairness to Encik Ramid Khan who appeared for the proposed intervener, that he made his position fairly clear about the difficulty in which he finds himself. He says that any application by him to the High Court may be doomed to failure even before it begins because the High Court might gain the impression that it was beyond its powers to entertain his client's application. The suggestion by counsel is that the High Court might apprehend a breach of this court's order if it were to hear and determine Encik Ramid Khan's client's application to exclude itself from the retrial. We understand and appreciate counsel's difficulty and it is for that purpose and that purpose only, that this judgment is being delivered.

To obviate any difficulty, we wish to make it absolutely clear that the High Court has ample power and jurisdiction to entertain the bank's application to have itself removed as a party. Of course in making its decision, the High Court must apply established principles including those that govern the taking of points by way of defence rather than by way of an application to strike.

This brings us to the present motion. We are entirely convinced that the application made to us on Monday is misconceived. Once we had disposed of this appeal as per the terms already set out in this judgment, we became *functus officio*.

The application being devoid of any merits, is bound to fail. It is dismissed. Our learned brother Abdul Kadir bin Sulaiman JCA will now deliver the formal orders we make in this case.

Abdul Kadir Sulaiman JCA:
This motion is dismissed with costs to the appellants and respondents by consent at RM500 which is to be divided between the appellants and the respondents at RM250 each.

Arguments heard on 26 August 2002 and judgment delivered in open court on 28 August 2002.